

(9)
No. 88-305

Supreme Court, U.S.
FILED
DEC 8 1988
JOSEPH F. SPANIOL,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

—
SOUTH CAROLINA,

Petitioner,

v.

DEMETRIUS GATHERS,

Respondent.

—
On Writ Of Certiorari To The
Supreme Court Of South Carolina

—
MOTION TO DISMISS

—
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Counsel for Respondent

Comes now, Demetrius Gathers, by and through his undersigned counsel who would request of this Court a dismissal of the Petition for Writ of Certiorari as a result of a fatal procedural default committed by the State of South Carolina. Petitioner's failure to request the Supreme Court of South Carolina to retain jurisdiction over the matter under state procedural law leaves this Court likewise without jurisdiction to review the judgment.

I. PROCEDURAL HISTORY

A.

On March 20, 1987, Demetrius Gathers was convicted in the Court of General Sessions for Charleston County, South Carolina, for murder and criminal sexual conduct in the first degree. On March 21, 1987, a jury rendered a sentencing verdict of death by electrocution. On June 6, 1988, the Supreme Court of South Carolina affirmed Gathers' convictions but reversed his sentence of death and remanded the case to the Court of General Sessions for Charleston County for a new sentencing proceeding.

B.

Petitioner, State of South Carolina, took no action following the Court's reversal of Gathers' death sentence. No Petition for Rehearing was filed and no request to Stay the Remittitur in the case was made. Consequently, and in accordance with South Carolina Supreme Court Rule 17 § 1, and S.C. Code Ann. § 18-9-270, 1976, as amended, on June 17, 1988, the Supreme Court of South Carolina remanded the Remittitur in this case to the Court of General Sessions for Charleston County. (See Exhibit A). On October 27, 1988, Demetrius Gathers filed a Motion for a Speedy Trial with the Clerk of Court of General Sessions for Charleston County, service of which was

acknowledged by the solicitor of the Ninth Judicial Circuit for the State of South Carolina. (See Exhibit B).

II. SOUTH CAROLINA'S PROCEDURAL DEFAULT

A.

By failing to request of the Supreme Court of South Carolina a Stay of the Remittitur in this case, Petitioner, State of South Carolina, has committed a procedural default which bars review of this case by this Court. This is so because under long established South Carolina procedural law, the state Supreme Court lost jurisdiction of the matter at the time of the remanding of the Remittitur. *Ex parte Dunovant*, 16 S.C. 299 (1881); *Brooks v. Brooks*, 16 S.C. 621 (1882). Moreover, after a Remittitur has been sent down the Supreme Court of South Carolina no longer has the power to order it returned so as to correct errors. *Carpenter v. Lewis*, 65 S.C. 400, 43 S.E. 881 (1903), because the Supreme Court's control of the judgment ends when the Remittitur has issued. *State v. Adams*, 83 S.C. 149, 65 S.E. 220 (1909); *State v. Merriman*, 35 S.C. 607, 14 S.E. 394 (1891).

B.

While noting that it is important to distinguish between state substantive grounds and state procedural grounds, in *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564 (1965) this Court held that application of a state procedural rule may bar review by this Court of a state trial proceeding if that procedural rule serves a legitimate state interest. Also see *Wainwright v. Sykes*, 433 U.S. 72, 108, 97 S.Ct. 2497 (1977) Brennan, J. dissenting; and *Michigan v. Tyler*, 436 U.S. 499, 513, 98 S.Ct. 1942, 1951 (1978). Indeed, in *Henry v. Mississippi*, this Court stated that:

where the state rule is a reasonable one and clearly announced to defendant and counsel, application of the waiver doctrine will yield the same result as that of the adequate non-federal ground doctrine in the vast majority of cases.

379 U.S. at 448, note 3. It is important to note that the legitimate state interest requirement of the application of a state procedural rule was set out in *Henry* in conjunction with the assertion of a constitutionally protected federal right guaranteed to individuals. The State of South Carolina seeks the vindication of no such right. Thus, under *Henry, supra*, the legitimate state interest should necessarily warrant a lesser degree of scrutiny, and the State of South Carolina should be held to a higher standard in its duty to comport its actions with state procedural requirements. Nevertheless, the state Supreme Court's issuance of the remittitur and relinquishment of jurisdiction to the lower court, serves the ultimate interest of appellate review: finality and the orderly administration of the state judiciary itself.

But more importantly, Respondent, Demetrius Gathers himself, has relied on application of the state procedural rule. This can be demonstrated by the fact that there were issues raised in the direct appeal to the Supreme Court of South Carolina which were not addressed by that Court. We would direct the Court's attention to the Petition for Writ of Certiorari at page 47 where Petitioner, State of South Carolina, quotes from the State Court opinion. The opinion states:

We need not address Appellant's remaining exceptions. Appellant's convictions are affirmed, the death sentence reversed, and the case is remanded for a new sentencing proceeding.

Under South Carolina law, a sentence of death cannot be affirmed by the state Supreme Court absent a ruling on

all legal errors in the case. *S.C. Code Ann.* § 16-3-25 (F), 1976, as amended, states

the sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. *The Court shall render its decision on all legal errors*, the factual substantiation of the verdict, and the validity of the sentence.

Emphasis Added. Clearly, had Petitioner, State of South Carolina, stayed the proceeding in this case it would have put Respondent Gathers on notice that the State intended to seek further review of the Eighth Amendment claim in this case. As a result of that notice, Gathers could have petitioned the Supreme Court of South Carolina to either clarify its initial decision, or expand the scope of that decision to include the additional legal errors asserted in the appeal which were not reached by the opinion.¹

C.

The Supreme Court of South Carolina's Order in this case became final on June 6, 1988, the date of its publica-

¹ Additional errors which arose from the Gathers sentencing proceeding included: (1) a challenge to the adequacy of the lower court's instruction to the jury concerning the finality of the verdict as opposed to being merely an advisory verdict; (2) whether the lower court committed reversible error when it neglected to charge a mitigating circumstance as required by *S.C. Code Ann.* § 16-3-20 (C)(b)(1) to the effect that Gathers was an accomplice in a murder committed by another; and (3) whether the trial court committed reversible error when it instructed the jury that they were not concerned with the issue of guilt or innocence during the sentencing phase of the proceeding and, further, whether the trial judge committed reversible error when it instructed the jury to "weigh" aggravating circumstances against mitigating circumstances in violation of *State v. Bellamy*, ____ S.C. ____, 359 S.E.2d 63 (1987).

tion. *Dept. of Banking, State of Nebraska v. Pink*, 317 U.S. 264, 267, 63 S.Ct. 233, (1942). *Pink* holds that the time for computing when a petition for certiorari is due runs from the order's date and not from the entering of the judgment on the order in the lower court. Thus, finality as contemplated by 28 U.S.C. 1257(3) is not deferred by the latent power of a state's highest court to reopen the matter and revise its judgment. *Market St. Ry. Co., v. Railroad Commission of the State of California*, 324 U.S. 548, 551, 65 S.Ct. 770. (1945).

III. CERTIORARI JURISDICTION

A.

In the *Market Street* case this Court dismissed the reason why such a latent power in a state Supreme Court to revise its judgment should not be permitted to defeat the notion of finality.

Such latent powers of state courts over their judgments are too variable and indeterminate to serve as tests of our jurisdiction. Our test is a practical one. When the case is decided, the time to seek our review begins to run.

324 U.S. at 551-52. However, the concept of finality is but one of several *conditions precedent* which have been established by federal law and which must be satisfied before the exercise of this Court's jurisdiction over a state court judgment.

Statute 28 U.S.C. § 1257 requires as conditions precedent finality, prior review by the state's highest court, and *inter alia*, the claim of a right that is specially set up under the United States Constitution. Petitioner asserts this Court possesses jurisdiction over the matter under authority of 28 U.S.C. § 1257(3). Of course, as allowed by 28 U.S.C. § 2101(d) this Court has established as an addi-

tional condition precedent to jurisdiction the sixty day filing requirement under Supreme Court Rule 20.1. However, we assert that other conditions precedent exist which must be satisfied before this Court may properly exercise jurisdiction over a state court judgment.

B.

The granting of a Petition for Writ of Certiorari has been held to operate as a stay of lower court proceedings. See *Glick v. Ballentine Produce, Inc.*, 397 F.2d 590 (8th Cir. 1968); *United States v. Eisner*, 323 F.2d 38 (6th Cir. 1963) construing 28 U.S.C. § 2101. However, the mere filing or anticipated action of filing such a Petition does not translate into an automatic stay. *Glick, supra*, 397 F.2d at 594. Certainly, therefore, Petitioner can claim no right to expect that state court proceedings should be automatically stayed simply because it intended to file timely under 28 U.S.C. § 1257(3) and Supreme Court Rule 20.1, nor could it assume that nothing of consequence could occur during the interim period between the issuance of the state court order and the granting of the Petition by this Court. Therefore, it is argued that 28 U.S.C. § 2101 creates another jurisdictional condition precedent, if absent its application, events could transpire which defeat the practical effects of this Court's exercise of jurisdiction.

As with the definition of "finality" in the *Market Street* example, within Constitutional and statutory parameters this Court controls and defines the nature and scope of jurisdictional conditions precedent which allow for the ultimate exercise of Certiorari jurisdiction. This is necessary to minimize variable and indeterminate factors. *Market Street Ry. Co.*, *supra*. However, as in the case of *Henry v. Mississippi*, *supra*, state procedural requirements must be satisfied when failure to do so materially

affects this Court's practical ability to exercise appellate or certiorari jurisdiction. Because Petitioner failed to take proper steps to stay the state court proceedings (including the issuance of the remittitur) the Writ now sought is directed to a state court which lacks subject matter jurisdiction.

No doubt, Petitioner, State of South Carolina, should have requested a Stay of the state court proceedings in this matter before it sought certiorari review in this Court. 28 U.S.C. § 2101(f) e.g. *California v. Reigler*, 449 U.S. 1319 (1981); *Fare v. Michael C.*, 439 U.S. 1310 (1978). However, no such action was taken to preserve any rights possessed by the Petitioner. Consequently, under state law (which has been in effect throughout this century) the Supreme Court of South Carolina lost jurisdiction to act further in this case. This is a fatal default committed by Petitioner and bars the review it seeks in this Court.

Legal orders validly and properly made in obedience to the higher court are not to be set aside by the subsequent granting of a certiorari writ. *Louisville N.A. & C.Ry. Co. v. Louisville Trust Co.*, 78 F. 659 (6th Cir. 1897). Consequently, the South Carolina Supreme Court's issuance of the state remittitur to the Court of General Sessions for Charleston County, conferring subject matter jurisdiction over the case on the inferior court, is not defeated by a subsequent granting of the writ by this Court.² And this

² At this point, if the *Market Street* case needs to be distinguished procedurally, it should be noted that a stay of the administrative order had been sought and obtained in the state court system in that case. 65 S.Ct. at 553. Therefore, unlike Petitioner State of South Carolina, action had been taken in the *Market Street* case to preserve the status quo pending an ultimate resolution of the dispute. Secondly, the Court's opinion in *Market Street* gives no indication that a challenge to this Court's jurisdiction was made on the procedural grounds advanced herein.

Court has held that subsequent proceedings taken in accordance with local rules of procedure can defeat this Court's appellate jurisdiction. *Southern and Northern etc. v. Public Utilities Comm. of Calif.*, 434 U.S. 9, 98 S.Ct. 251 (1977).

This Court has jurisdiction only over the Supreme Court of South Carolina and not the Court of General Sessions for Charleston County, South Carolina. *Beilan v. Board of Public Education of Philadelphia*, 357 U.S. 399 (1958). Because under local law jurisdiction over the case now resides with the inferior court, Petitioner South Carolina must affirmatively show that any writ of certiorari to the inferior court could not have been directed to the Supreme Court. *C.f. Fisher v. Perkins*, 122 U.S. (1887). This Court has held that a writ of error addressed to a state's highest court must be dismissed if that court lacks jurisdiction over the matter. *Randall v. Board of Commissioners*, 261 U.S. 252, 43 S.Ct. 252 (1923). Since as a matter of state law the Supreme Court of South Carolina now lacks jurisdiction over this case, Petitioner's Writ of Certiorari to the Supreme Court of South Carolina must be dismissed.

IV. ADVISORY DETERMINATION

A.

Under 28 U.S.C. § 2106 this Court may take various actions upon orders "... of a court lawfully brought before it for review ..." However, neither 28 U.S.C. § 2106 nor 28 U.S.C. § 1257 empowers this Court to order a state court to exercise subject matter jurisdiction over a cause in contravention of state law, when that jurisdictional power has been lost as a result of a party litigant's

procedural default.³ To reach a contrary conclusion could require the Supreme Court of South Carolina to act in a manner which is inconsistent with century old precedent and places this Court in the partial position of moving to protect the interests of one party litigant when that party has itself neglected to do so. Application of this procedural rule, therefore, could nowise be construed as constituting merely an attempt to "evade review." See *Konigsberg v. State Bar of Calif.*, 366 U.S. 36, 82 S.Ct. 21 (1961); *Henry v. Mississippi*, *supra*.

B.

As previously noted Demetrius Gathers has filed a Motion for a Speedy Trial in the court which now has jurisdiction over the matter. Consequently there is no reason why Mr. Gathers cannot be retried at this time and sentenced to life imprisonment. Therefore, any decision rendered by this Court on Petitioner's request for certiorari review would be advisory only on the scope of Eighth Amendment law in that Gathers' death sentence cannot be reinstated absent subject matter jurisdiction in the state Supreme Court. Advisory opinions by this Court are not favored, *North Dakota State Board of Pharmacy v. Snyder's Drugstores, Inc.*, 414 U.S. 156 (1973); *Herb v. Pitcairn*, 324 U.S. 117, 65 S.Ct. 459 (1945), and can encroach upon the plenary powers reserved by the state Supreme Court. *Johnson v. Radio Station WOW*, 146 Neb.429, 19 N.W.2d 853 (1945). Also see *United States v. Fruehauf*, 365 U.S. 146, 81 S.Ct. 547 (1961) where this Court refused to give an advanced expression

³ On this ground cases such as *Aetna Casualty Co. v. Flowers*, 330 U.S. 464, 67 S.Ct. 798 (1947) can be distinguished. Those cases permit a recall of a federal circuit court remand, and thus do not reach matters of state court jurisdiction.

of legal judgment upon issues which remained unfocused. The Eighth Amendment question in the present case is in a similar posture because we do not know at this time the true nature of either the State's theory of the case at resentencing or the evidence to be introduced at that time.

CLARIFICATION OF OPINION

On October 25, 1988, Demetrius Gathers filed a "Motion for Clarification of Opinion" with the Supreme Court of South Carolina. To that motion on November 23, 1988, Petitioner responded that the state Supreme Court lacked jurisdiction to entertain such a request. While this Court may remand a case for clarification of opinion if it cannot readily be discerned whether the opinion rests on application of state law or federal law, *Orr v. Orr*, 440 U.S. 268, 277 99 S.Ct. 1102, 1110 (1979), we would submit that such a remand by this Court could only be made if the record shows that certiorari jurisdiction had been established *ab initio*. As of the date of this motion, the Supreme Court of South Carolina has not ruled on the Motion for Clarification.

CONCLUSION

WHEREFORE, Demetrius Gathers would respectfully request of this Court that the Petition for Writ of Certiorari be dismissed as improvidently granted as a result of Petitioner's procedural default; in the alternative and subject to the foregoing prayer, we would request that this Court stay the proceeding in this Court and remand the case for clarification, *Orr v. Orr, supra*; in the alternative and subject to the foregoing, we would request that the Petition for Writ of Certiorari be dismissed without prejudice pending the outcome of Respondent's Motion for Clarification now pending in the state Supreme Court. *Southern & Northern, etc., v. Public Utilities Comm. of Calif., supra*.

Respectfully submitted,

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Telephone: 803-734-1330
Counsel for Respondent

APPENDIX

EXHIBIT A

The Supreme Court of South Carolina

June 17, 1988

The Honorable Howard A. Taylor
Clerk of Court, Charleston County
P.O. Box 293
Charleston, SC 29401

Re: The State v. Demetrius Gathers

Dear Mr. Taylor:

Enclosed is the remittitur in the above case.

By copy of this letter, all counsel of record are advised of the action of the Court.

Sincerely yours,

/s/Clyde N. Davis, Jr.
CLYDE N. DAVIS, JR.
CLERK

CND,JR/csl

Enclosure

cc: Joseph L. Savitz, III, Esquire
Joseph F. Kent, Esquire
The Honorable Donald J. Zelenka

EXHIBIT B

**State of South Carolina
County of Charleston.**

IN THE COURT OF GENERAL SESSIONS
CASE No. 87-GS-10-0468

STATE OF SOUTH CAROLINA,

v.

DEMETRIUS GATHERS,

Defendant.

MOTION FOR SPEEDY TRIAL

Comes now, Demetrius Gathers, by his Attorney, J. Wescoat Sandlin, moving that he be granted a speedy trial.

s. J. Wescoat Sandlin
J. WESCOAT SANDLIN
Attorney for Defendant
18 Broad Street, Suite 304
Charleston, S.C. 29401
(803) 723-6559

October 27, 1988

**State of South Carolina
County of Charleston.**

IN THE COURT OF GENERAL SESSIONS
CASE No. 87-GS-10-0468

STATE OF SOUTH CAROLINA,

v.

DEMETRIUS GATHERS,

Defendant.

ACKNOWLEDGMENT OF SERVICE

Service of a copy of the Motion For Speedy Trial in the above entitled action hereby acknowledged at Charleston, South Carolina, this 31st day of October, 1988.

/s/Sheila Miterand
SHEILA MITERAND
SOLICITOR, NINTH JUDICIAL CIRCUIT